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April 23, 2001

VIA FEDERAL EXPRESS/EMAIL

Mary L. Cottrell, Secretary

Department of Telecommunications & Energy

Commonwealth of Massachusetts

One South Station, Second Floor

Boston, MA 02110

Re: D.T.E. 01-34 Investigation of Verizon-Massachusetts's Provision of Special Access Services

Dear Ms. Cottrell:

Please accept for filing in the above-referenced proceeding the original and one copy each of the attached "Comments of PaeTec Communications, Inc. and Allegiance Telecom of Massachusetts, Inc. In Support of Motions to Expand Investigation."

Very truly yours,

Kevin Hawley

cc: Joan Foster Evans, Esq.

Michael Isenberg, Esq., Telecommunications Director

Attached Service List (w/enc.)

DEPARTMENT OF TELECOMMUNICATIONS

COMMONWEALTH OF MASSACHUSETTS

Investigation by the Department )

of Telecommunications and Energy )

on its own motion pursuant to )

G.L. c. 159, §§ 12 and 16, into Verizon ) D.T.E. 01-34

New England Inc. d/b/a Verizon )

Massachusetts' provision of )

Special Access Services )

COMMENTS OF PAETEC COMMUNICATIONS INC. AND

ALLEGIANCE TELECOM OF MASSACHUSETTS, INC.

IN SUPPORT OF MOTIONS TO EXPAND INVESTIGATION

Pursuant to the Commission's order of April 4, 2001, PaeTec Communications, Inc. ("PaeTec") and Allegiance Telecom of Massachusetts, Inc. ("Allegiance") (referred to collectively as "Joint Respondents") hereby respond in support of the motions of AT&T Communications of New England, Inc. and Conversent of Massachusetts, LLC to

expand this investigation. In support of their response, Joint Respondents state as follows:

1. On April 6, 2001, AT&T filed a motion to expand the above-referenced investigation to include special access services provided by Verizon under its federal tariff, in addition to such service provided under Verizon's DTE Tariff No. 15. AT&T's motion followed a previous motion filed on March 30, 2001 by Conversent, to expand the scope of this investigation to include unbundled DS-1 loops provided under D.T.E. Tariff No. 17.

2. Joint respondents concur with AT&T that: (1) expansion of this investigation is warranted by the same circumstances that caused the Department to initiate this investigation in the first place; and (2) that the Department has more than ample jurisdiction to do so.

3. As AT&T points out in its motion, the same provisioning and service quality problems associated with Verizon's special access service under D.T.E. No. 17 warrant investigation of the same service provided by Verizon under its tariffs on file with the Federal Communications Commission ("FCC"). The ordering processes, equipment and connections involved in providing special access services under Verizon's FCC tariffs are the same as under its D.T.E. No. 17 state tariff. Moreover, a large percentage, if not most, of the intrastate special access service provided by Verizon in Massachusetts is provided pursuant to the federal tariff. Indeed, Verizon provisions special access circuits under the federal tariff, unless the percentage of intrastate traffic on the circuit is expected to exceed ninety (90) percent.

4. Joint Respondents also agree with AT&T that the Department has jurisdiction to investigate service provided by Verizon under its federal tariff. As stated above, as much as ninety (90) percent of the traffic served under Verizon's FCC tariff is intrastate. Congress has neither expressly, nor implicitly, preempted state jurisdiction over the provision of special access services for intrastate traffic under FCC tariffs. In these circumstances, as the Supreme Court recognized in Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986), the states have overlapping jurisdiction with the FCC to regulate facilities that serve both interstate and intrastate. Such dual jurisdiction was confirmed by Congress in passing the Telecommunications Act of 1996. See Iowa Utilities Bd. v. FCC, 525 U.S. 366 (1999); see also Complaint of AT&T Communications of the Midwest, Inc. Against U.S. West Communications, Inc. Regarding Access Service, 2000 Minn. PUC LEXIS 53 (Docket No. p. 421/C-99-183) (subjecting to investigation special access services under FCC tariff).

5. Verizon has recently argued before the New York Public Service Commission, and may be expected to argue here, that the FCC's decision granting Verizon's Massachusetts 271 application establishes Section 208 of the federal Communications Act of 1934 as an exclusive remedy for problems with the provisioning of special access circuits. Such an argument is wholly unfounded. In New York, Verizon pointed to paragraphs 211 and 231 of the FCC's Massachusetts 271 Order.(1) Those paragraphs establish the FCC's belief that to the extent that such problems are addressed by the FCC, the proper forum is a Section 208 complaint, not a Section 271 proceeding. Nothing in the FCC's Massachusetts 271 Order establishes that an FCC Section 208 proceeding is the exclusive remedy for such problems. Likewise, the FCC in no way suggests that the overlapping federal/state jurisdictional scheme established by the United States Supreme Court in Louisiana Public Service Commission v. FCC and Iowa Utilities Board v. FCC is inapplicable to special access circuits that carry both interstate and intrastate traffic. Indeed, the FCC does not in any way address the issue of state jurisdiction, confining itself solely to the issue of what federal procedural remedy is appropriate. In sum, nothing in the FCC's Massachusetts 271 Order in any way undermines the principle of overlapping or concurrent jurisdiction advanced here by AT&T.

6. As for Verizon's contention before the New York Commission that any investigation of its special access service provided under its FCC tariff is barred by the filed

tariff doctrine, that contention is ridiculous. The filed tariff doctrine does not - as Verizon suggests - constrain the remedial power of a jurisdictional agency with respect to rates, terms and conditions of service set forth in a published tariff. The filed tariff doctrine merely holds that the rates, terms and conditions under which a common carrier provides service are governed exclusively by the carrier's duly filed tariff, notwithstanding any contract, understanding of the parties, practice, or judicial decree at variance with such tariff. See American Telephone and Telegraph v. Central Office Telephone, Inc., 524 U.S. 214 (1998). The tariff filing requirement is not a trump card that immunizes the carrier from regulatory scrutiny under an agency's statutory authority to ensure that the rates terms and conditions of service are just, reasonable and nondiscriminatory.(2) To the extent this Commission has concurrent jurisdiction over so-called "interstate" special access service, it has jurisdiction to regulate the rates, terms, and conditions under which intrastate traffic is served, FCC tariff or no FCC tariff.

7. Nor is the filed tariff doctrine relevant to the salient issue of state jurisdiction over special access service provided by Verizon under its FCC tariff. Just as the existence of a tariff does not establish agency jurisdiction, the absence of a tariff does not preclude jurisdiction. See, e.g., Puerto Rico Maritime Shipping Authority v. Valley Freight Systems Inc., 856 F. 2d 546 (3d Cir. 1988); see also, Shell Oil Co. v. FERC, 47 F.3d 1186 (D.C. Cir. 1994). It is thus axiomatic that a carrier cannot oust the jurisdiction of one agency simply by filing a tariff with another agency. Id.

8. Joint Respondents support Conversent's motion to expand this proceeding to include DS-1 loops as well. Conversent correctly observes that such high capacity loops are operationally and functionally the same as the facilities used to provide special access service. Indeed, the functional equivalent of special access service can be and is provided by CLECs over unbundled DS-1 loops. Moreover, Verizon's service and provisioning of unbundled DS-1 loops has been as bad, if not worse, than that associated with its special access service.

9. The low regard shown by Verizon for its obligation to provide DS-1 loops on a timely basis and to address problems in a reliable and timely manner is manifested by its recent actions before the FCC. On April 5, 2001, Verizon and other regional Bell Operating Companies petitioned the FCC to exclude DS-1 and other high capacity loops from the FCC's unbundling requirements on the pretext that such loops are available from other competitive alternatives. Unfortunately, such ubiquitous competitive alternatives for DS-1 loops do not exist in Massachusetts - if they do anywhere - and these loops must be obtained from Verizon.

10. With Verizon having taken the first step to avoid its responsibility of providing DS-1 loops to CLECs at all for the future, the Department should respond by investigating its level at which it performs its obligation to provide such loops under which those loops are provided today.

CONCLUSION

For the forgoing reasons, PaeTec and Allegiance respectfully requests that the Department expand the scope of this proceeding to include special access service provided in Massachusetts under Verizon's federal tariff as well as Verizon's provisioning of DS-1 loops.

Respectfully submitted.

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Counsel for PaeTec Communications, Inc. and Allegiance Telecom of Massachusetts, Inc.

Dated: April 23, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2001, copies of the foregoing COMMENTS OF PAETEC COMMUNICATIONS, INC. AND ALLEGIANCE TELECOM OF MASSACHUSETTS INC. IN SUPPORT OF MOTIONS TO EXPAND INVESTIGATION were sent via first-class mail, U.S. postage prepaid, to the parties on the official service list.

Sonja Sykes-Minor

1.

1 In the Matter of the Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks, Inc. for Authorization to Provide In-Region InterLATA Services in Massachusetts, Memorandum

2.

2 Contrary to the suggestion of Verizon before the New York Commission, the raison d'etre of the filed rate doctrine is not merely to ensure carrier adherence to the rates, terms and conditions of service set forth in the tariff. Security Service, Inc. v. K Mart Corp., 511 U.S. 431, 435 (1994); Maislin Industries, U.S., Inc. v. Primary Steel, Inc. 497 U.S. 116, 146, n. 11 (1990). It is also (and just as importantly) intended to facilitate agency oversight to ensure that the rates, terms and conditions set forth in the tariff are just reasonable and nondiscriminatory. Id. This remedial authority stands regardless of where the carrier files its tariff, for the reasons stated above.